No. 78-1821

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVIA L. MENDENHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-7a) is reported at 596 F.2d 706. The opinion of the panel (Pet. App. 8a) and the opinion of the district court (Pet. App. 9a-20a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1979. On April 27, 1979, Mr. Justice

Stewart extended the time within which to file a petition for a writ of certiorari to June 5, 1979. The petition for a writ of certiorari was filed on that date and was granted on October 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether respondent was illegally seized when federal agents approached her and asked her for identification.

2. Whether respondent's Fourth Amendment rights were violated when she accompanied the agents from the airline terminal concourse to a nearby office for further questioning.

3. Whether a suspect who is being illegally detained can validly consent to a search.

STATEMENT

1. Since 1974, the Drug Enforcement Administration has developed an extensive airport surveillance program designed to intercept domestic couriers transporting narcotics between major drug source and distribution centers in the United States. The program was primarily initiated and developed by DEA agents assigned to Detroit, Seattle and La Guardia Airports, and now operates at more than 25 airports throughout the nation. This program is an important part of DEA's total drug enforcement effort. Airport enforcement provides a unique opportunity to intercept large quantities of high-grade

drug shipments at a point in the distribution chain well above that reached by the traditional undercover-buy approach to drug law enforcement.

The program has resulted in the interception of substantial quantities of illicit drugs [1] and has also generated a corresponding abundance of litigation in both federal and state appellate courts.[2] Many domestic courier cases are made through on-going in-

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[1] The operation and success of the Detroit airport program is most fully described in the opinion of the district court in *United States* v. *Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976), aff'd, 556 F.2d 385 (6th Cir. 1977), based on evidence adduced at an extensive suppression hearing. Further data demonstrating the high success rate of the program was developed in the suppression hearing in *United States* v. *Camacho*, which was considered by the en banc court together with this case. This evidence was presented to the court of appeals in our petition for rehearing in this case and *Camacho* (C.A. App. 44-46). In 1976 alone, 66 pounds of heroin were seized at the Detroit Airport. Some of these statistics are set forth in greater detail in Judge Weick's dissent (Pet. App. 4a n.1).

[2] For some of the recent cases considering suppression motions arising out of the operation of the program, see *United States* v. *Price*, 599 F.2d 494 (2d Cir. 1979); *United States* v. *Rico*, 594 F.2d 320 (2d Cir. 1979); *United States* v. *Elmore*, 595 F.2d 1036 (5th Cir. 1979), petition for cert. pending, No. 78-6884; *United States* v. *Troutman*, 590 F.2d 604 (5th Cir. 1979); *United States* v. *Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States* v. *Pope*, 561 F.2d 663 (6th Cir. 1977); *United States* v. *McCaleb*, 552 F.2d 717 (6th Cir. 1977); *United States* v. *Chatman*, 573 F.2d 565 (9th Cir. 1977); *People* v. *Clifford*, 2d Crim. No. 33085 (Cal. App. March 16, 1979); *Husted* v. *State*, No. 78-1830 (Fla. May 8, 1979); *State* v. *Reid*, No. 57466 (Ga. App. April 4, 1979), petition for cert. pending, No. 79-448.

vestigations or tips from other units that focus on an individual passenger. Many other cases, however, are made without the benefit of prior information. Trained and experienced agents observe arriving and departing passengers on certain flights for characteristics and behavioral traits that, on the basis of their collective experience, have tended to distinguish drug couriers from ordinary passengers.[3]

The DEA and its agents in the field have also developed relatively standard procedures for approaching and questioning individuals suspected of being drug couriers.[4] These procedures generally involve: (1) an initial contact with the suspect to check his identification and ticket; (2) a request that the suspect move from the public areas of the terminal to a nearby office if the agents believe that further questioning is appropriate; and (3) a request in the office for consent to search the suspect's effects or person. This case represents a fairly typical example of the operation of the airport surveillance program and of the legal questions that it has generated.

2. Following a non-jury trial on stipulated facts in the United States District Court for the Eastern

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[3] These traits and characteristics, sometimes referred to as a "drug courier profile," include such elements as round trips of short duration between major drug centers, purchasing tickets with cash, little or no baggage, changing airlines during the trip, using an alias, and, in general, nervous or unusual behavior. See *United States* v. *Van Lewis, supra,* 409 F. Supp. at 538; A. 8.

[4] The DEA is in the process of preparing official policy guidelines for use by DEA airport details.

District of Michigan, respondent was convicted of possession of heroin with intent to distribute it in violation of 21 U.S.C. 841(a)(1).[5]

The evidence at a pretrial suppression hearing showed that early on the morning of February 10, 1976, two DEA agents stationed at the Detroit Metropolitan Airport were observing passengers deplaning from an American Airlines flight from Los Angeles. Los Angeles was known to the agents as a major source of narcotics (A. 9, 15). Agent Anderson's attention was drawn to respondent, who was the last person to leave the airplane. In his experience, encompassing 10 years with DEA and participation in approximately 100 arrests during his assignment to the Detroit Airport (A. 7; Pet. App. 13a-14a), drug couriers tend to deplane last, particularly on early morning flights, so that they can more easily detect agents who might be watching them (A. 9).

Anderson testified that respondent "completely scanned the whole area where we were standing" and "appeared to be very nervous" as she came off the airplane (A. 9, 14). Respondent proceeded past the baggage claim area but claimed no luggage—a fact that the agents had found to be another common characteristic of drug couriers (A. 8, 10). Respondent instead went to the Eastern Airlines ticket counter (A. 10). Agent Anderson stood in line directly behind her at the counter and watched as she took her

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[5] Respondent was sentenced to a term of 18 months' imprisonment, to be followed by a three-year special parole term.

ticket from her purse. He was able to observe the ticket as she held it in her hand; it was an American Airlines ticket marked for travel from Los Angeles through Detroit to Pittsburgh (*ibid.*). Respondent sought to change her ticket from American to Eastern, keeping Pittsburgh as her destination (*ibid.*); this was significant to the agent because couriers frequently change airlines and flight times to evade surveillance and detection (A. 10-11).

Respondent then left the ticket counter and headed for the Eastern flight departure gate (A. 11). The agents approached her on the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket (*ibid.*). Respondent produced her driver's license, which was in the name of Sylvia Mendenhall. Her ticket, however, was issued in the name of "Annette Ford." When asked why the ticket was under a different name, respondent stated that she "just felt like using that name" (*ibid.*). The agents' suspicions were heightened when respondent stated that she had remained in California only two days, which seemed an unusually brief period for a journey of that distance (*ibid.*). Agent Anderson then specifically identified himself as a federal narcotics officer, and respondent "became quite shaken, extremely nervous. She had a hard time speaking" (A. 11-12).[6]

Agent Anderson then asked respondent if she would accompany him to the DEA office for further ques-

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[6] The entire conversation in the concourse lasted only two or three minutes (A. 12).

tions, and she agreed (A. 12). The office is a short walk up a flight of stairs and is located about 50 feet from where respondent was approached (A. 19). The office consists of a reception area with three other rooms branching off from that area (A. 20-21). At the office, the agent asked her if she would mind allowing a search of her person and handbag and told her that she had the right to decline the search if she so desired. She responded, "Go ahead" (A. 12). She then handed Agent Anderson her purse, which contained a different airline ticket that had been issued to "F. Bush" three days earlier for a flight from Pittsburgh through Chicago to Los Angeles (*ibid.*). Respondent admitted that this was the ticket on which she had flown to California but gave no reason for using that additional alias (*ibid.*).

A female police officer then arrived to search respondent's person (A. 12-13). She asked the agents if respondent had consented to be searched (A. 24). The agents said that she had, and respondent followed the policewoman into a private room. There the policewoman again asked respondent if she consented to the search, and respondent replied that she did (*ibid.*). The policewoman explained that the search would require the removal of respondent's clothing. Respondent stated that she had a plane to catch and was assured by the policewoman that if she had nothing on her, there would be no problem (*ibid.*). Respondent then began to disrobe without further comment (*ibid.*). As respondent removed her clothing, she took a plastic package from her bra,

which appeared to contain heroin, and another package, wrapped in brown paper, from her underpants, and handed both to the policewoman (A. 24-25).[7] The agents then arrested respondent for possessing heroin (A. 13).[8]

3. The district court denied petitioner's motion to suppress the heroin found on her person (Pet. App. 9a-20a). The court concluded that the agents' action in initially approaching respondent and asking to see her ticket and identification was a permissible investigative stop under the standards of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), because it was based on specific and articulable facts that, in light of the agents' substantial experience, justified a reasonable suspicion of criminal activity and warranted the limited intrusion involved (Pet. App. 13a-16a). The court also found that respondent was not placed under arrest by having been asked to accompany the agents to the DEA office, that she had done so voluntarily and in a spirit of apparent cooperation, and that she was not arrested until after the heroin had been found (Pet. App. 16a). Finally, the court, specifically crediting Agent Anderson's testimony, found that respondent "gave her consent to the search [in the DEA office] and * * * such consent was freely and voluntarily given" (*ibid.*).[9]

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[7] The search took five to ten minutes (A. 13).

[8] Respondent was charged with possession of approximately 250 grams of heroin (Pet. App. 10a).

[9] The court also concluded that, although respondent was not arrested until after she had been searched and the heroin

4. A panel of the court of appeals reversed in a judgment order, stating only that "the court concludes that this case is indistinguishable from *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977)" (Pet. App. 8a).

In *McCaleb*, the court of appeals suppressed heroin seized by DEA agents at the Detroit Airport in substantially similar circumstances.[10] The court rejected the government's reliance on the agents' experience

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discovered, the agents had probable cause to arrest her before the search. The court outlined all of the facts known to the agents at that time, including the fact that respondent had been travelling under two different aliases, and concluded (Pet. App. 18a): "Although each of these facts, in and of themselves, are [*sic*] relatively innocuous and innocent, when all of them are found to coincide, and all of them are known characteristics of airborne drug couriers, they furnish the officer observing them with probable cause. To hold otherwise would be to direct DEA agents to forget all of their training and experience, to ignore the obvious, and to not use all of the education and investigative know-how which they are required to acquire and cultivate in order to obtain and keep their jobs."

[10] There are a number of differences between the facts in *McCaleb* and the instant case: for example, *McCaleb* involved three suspects travelling together; one of them claimed one suitcase from the luggage claim; and the agent, in asking consent to search the bag and advising them of their right to refuse, also advised them that if consent were refused, he would detain them while he sought a search warrant (552 F.2d at 719). See also note 50, *infra*. But the salient facts of the two cases are substantially similar—for example, round trips of short duration to Los Angeles, apparently little or no checked luggage, nervous behavior, use of aliases, and consents to search—and they present the same general questions of law.

and the "drug courier profile" (see note 3, *supra*), holding that the circumstances did not give rise to a reasonable and articulable suspicion justifying the initial approach and request for identification for the reason that "[t]he activities of the appellants in this case observed by DEA agents, were consistent with innocent behavior." 552 F.2d at 720.

The court in *McCaleb* further concluded that, even if the initial approach had been permissible, asking the suspects to accompany the agents to a private room for further questioning constituted an arrest requiring probable cause because at that point "appellants * * * were not free to leave [and thus] the arrest was clearly complete." *Ibid.* Finally, the court in *McCaleb* concluded that the consent to search in that case was not voluntary, primarily because of what the court believed to be the unconstitutional nature of the preceding stop and detention. *Id.* at 720-721.[11]

The case was reheard by the court en banc, which reinstated the panel decision stating simply that the majority was convinced that in this case there was not "valid consent to search within the meaning of

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[11] The court relied for this conclusion on *United States* v. *Bazinet*, 462 F.2d 982, 989 (8th Cir.), cert. denied, 409 U.S. 1010 (1972), in which the court stated that "the mere fact that a person has been arrested in violation of his constitutional rights casts grave doubt upon the voluntariness of a subsequent consent. The government has a heavy burden of proof in establishing that the consent was the voluntary act of the arrestee and that it was not the fruit of the illegal arrest" (footnote omitted).

[*McCaleb*]" (Pet. App. 2a).[12] The court also stated that it should "not * * * attempt to formulate definitive rules. Despite some general similarities, every single case differs from every other in material degree" (*ibid.*). The court did hold that "the so-called drug courier profile" does not, in itself, represent a legal standard of probable cause.

Judge Weick dissented. He noted that the majority had declined to decide any of the "questions of exceptional importance to be considered in connection with investigations by experienced federal agents of traffic in huge quantities of narcotics flowing into the Detroit airport * * *" (Pet. App. 4a). To the extent the majority relied on principles stated in *McCaleb*, Judge Weick concluded that "it is time to overrule *McCaleb* and its progeny" (*id.* at 6a).[13]

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[12] The court addressed the legality of the detention only implicitly. It is clear that its holding that the consent was not valid was based on the premise that the detention was unlawful, as in *McCaleb*, both because there was no reasonable suspicion justifying the stop and because an arrest requiring probable cause was effected when respondent was taken to the office for questioning.

[13] The instant case was considered by the en banc court jointly with *United States* v. *Camacho*, No. 78-5081. That case presented many of the same issues as this one and was disposed of by the court of appeals in the same manner. We did not seek review of the decision in *Camacho* because of the presence of certain additional factual circumstances that cast doubt upon the voluntariness of the consent to search in that case.

SUMMARY OF ARGUMENT

This case concerns the admissibility into evidence of contraband seized during a consent search. The court of appeals held that the evidence was inadmissible because it was the fruit of an illegal detention. Three distinct issues are presented: (1) whether an illegal seizure occurred when agents approached respondent in an airline terminal and asked her for identification; (2) whether it was illegal for the agents to ask respondent to accompany them to a nearby office for further questioning in the absence of probable cause; and (3) assuming that respondent was illegally seized at some point, whether her subsequent voluntary consent was invalid as a "fruit" of an illegal seizure.

I

The question whether respondent was illegally seized during the initial encounter in the airport concourse involves two distinct inquiries. First, it must be determined whether any "seizure" occurred within the meaning of the Fourth Amendment. If a "seizure" did occur, the question arises whether it was "illegal" or instead reasonably justified by the agents' grounds for suspicion.

A. The Court has recognized in *Terry* v. *Ohio*, 392 U.S. 1 (1968), and elsewhere that not all encounters between citizens and police officers constitute "seizures" that implicate the protections of the Fourth Amendment, although it has not had occasion to specify the precise criteria for determining whether particular encounters implicate the Fourth Amend-

ment. It is clear that a "seizure" does occur when a citizen is required to stay and submit to questioning by an officer; conversely, when an encounter does not entail a forcible detention (whether by physical restraint or other assertion of authority), no "seizure" has occurred. Policemen are free to seek cooperation from private citizens, even those suspected of criminal activity.

The test for determining whether a particular encounter constitutes a seizure focuses upon whether a reasonable person would have been under the impression that he was not free to leave the officer's presence. When the agent does not state to the individual whether he is free to leave and the latter never attempts to leave or to clarify his status, an ambiguous situation is presented that does not readily lend itself to a later, objective determination by a court whether a seizure has occurred. It is our submission that, in the absence of objective facts relating to the officer's actions or the surrounding circumstances from which it could reasonably be concluded that the person is not free to leave, the action of a police officer in approaching a person and asking a question or requesting identification should not be held to constitute a "seizure."

B. Assuming that the agents' approach to respondent did constitute a seizure of her person implicating the protections of the Fourth Amendment, we submit that it was a lawful *Terry* stop based upon a reasonable suspicion of criminal activity. The agents here relied on "specific and articulable facts" that they

observed, which indicated to them that respondent might be carrying drugs. The court of appeals rejected these facts as insufficient to support a *Terry* stop, noting that they were "consistent with innocent behavior." This standard cannot be a proper one, for even a finding of probable cause does not require that the observed facts be inconsistent with some hypothesis of innocent behavior.

A factor in the agents' suspicion was the coincidence of the facts that they observed with a "drug courier profile," an informal compilation of agents' experience that identifies certain characteristics as tending to distinguish drug couriers from ordinary passengers. We disagree with the implication of the court of appeals' opinion that the coincidence with profile characteristics is largely irrelevant. The profile is a legitimate method of pooling the experience of many agents in an organized fashion. Although the characteristics observed by the agents may seem innocent to the layman, it is appropriate to consider their meaning in the eyes of experienced agents. See *Brown* v. *Texas*, No. 77-6673 (June 25, 1979), slip op. 4 n.2. The factors relied on here were quite similar to those factors that the Court suggested as relevant in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975). We do not contend that the presence of factors contained in the drug courier profile *ipso facto* establishes a reasonable suspicion, but we do submit that the correlation of a person's behavior with profile characteristics is properly considered by the agents in determining whether a reasonable suspicion exists justifying a stop.

The reasonableness of an intrusion "depends on a balance between the public interest and the individual's right to personal security." *Brignoni-Ponce*, *supra*, 422 U.S. at 878. The government interest involved here of controlling illegal narcotic traffic is substantial, and the intrusion of a brief investigation is not great, as compared to the stop and frisk upheld in *Terry*. The facts observed by the agents certainly gave them grounds for suspicion sufficient to justify the minimal intrusion involved here.

II

A. The district court found that respondent accompanied the agents from the airport concourse to the nearby office "voluntarily in a spirit of apparent cooperation" (Pet. App. 16a). The move to the office, therefore, was by consent and does not constitute an intrusion that must be justified by satisfaction of the procedural or substantive requirements of the Fourth Amendment applicable in the absence of consent. The court of appeals apparently disregarded this consent on the ground that respondent was at that point not free to leave. The basis for this assertion is presumably the testimony by the agent that he would have stopped respondent from leaving after she agreed to go to the office. This subjective intent is irrelevant to the question of respondent's content. See *Scott* v. *United States*, 436 U.S. 128, 136-137 (1978). In any event, the court's analysis is erroneous. To the extent that the alleged illegality consist of the move to the office, the relevant inquiry is the freedom to decline to move to the office. There is no evidence in the

record that would support a finding that respondent had any objective basis for feeling compelled to agree to go to the office; the district court's finding that she went voluntarily is thus adequately supported and should have been accepted as dispositive by the court of appeals.

B. Assuming that respondent's voluntary consent to go to the office was not valid, the court of appeals erred in any event insofar as it held that the move constituted an arrest requiring probable cause. First, the court's assertion that an arrest occurred because respondent was not free to leave is manifestly incorrect. Whether or not a person is free to leave determines whether a "seizure" has occurred, not whether there has been an arrest; a person detained during a lawful investigative stop, although plainly not arrested, is nevertheless not free to leave. Second, the mere fact of movement to an office does not imply that an arrest requiring probable cause has occurred. A person may be required to move from where he is stopped pursuant to a lawful investigative stop, see *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); the lawfulness of the move is determined by its reasonableness under the circumstances. Here, the intrusion involved in the move of about 50 feet was quite small and must be balanced against significant practical considerations that rendered it reasonable to continue the investigation away from the public area of the terminal.

III

The record fully supports the finding of the district court that respondent's consent to the search was

"freely and voluntarily given" (Pet. App. 16a). The court of appeals does not appear to have rejected that finding; instead, it apparently invalidated the search as a "fruit" of an antecedent illegal detention. Granting *arguendo* the premise that respondent was illegally detained at the time she consented to the search, we submit that the court of appeals was nevertheless incorrect in determining that respondent's consent was invalid as the fruit of an illegal detention. When a person who is being illegally detained consents to a search after being advised of his right to refuse, that consent is an independent event, not an exploitation of the illegality.

Brown v. *Illinois*, 422 U.S. 590 (1975), which held that *Miranda* warnings do not necessarily dissipate the taint of an illegal arrest, is not to the contrary. First, *Brown* relied on the fact that *Miranda* warnings protect against Fifth Amendment violations and cannot remedy Fourth Amendment violations. In this case, the finding of a voluntary consent addresses the interests of the Fourth Amendment and can act to dissipate the taint of a prior Fourth Amendment violation.

Second, the attenuation principles set forth in *Brown* establish that the taint of any illegal detention was purged by the intervening event of the advice to respondent that she had a right to refuse to consent to a search. Unlike the *Miranda* warnings in *Brown*, which are constitutional prerequisites to an admissible confession, the advice here was not required in order to obtain a voluntary consent and was effective

to dispel any conclusion respondent might otherwise have drawn that because she was in temporary police custody she was not free to withhold consent to a search of her person. Thus the giving of the advice was a significant intervening event that served to break the causal connection between the allegedly illegal detention and the search. In addition, the conduct of the agents cannot be characterized as flagrant, particularly when compared to the police misconduct in *Brown* and *Dunaway*. Consequently, the *Brown* attenuation analysis indicates that the consent in this case was a valid one, not tainted by the alleged illegal detention.

ARGUMENT

The ultimate question in this case is the lawfulness of the search of respondent's person and the seizure of heroin from her. The court of appeals did not question the district court's finding that respondent had voluntarily consented to the search of her person, but instead suppressed the seized heroin on the ground that the search was an unattenuated fruit of prior Fourth Amendment violations. In Part I of this brief we argue that the initial contact between respondent and the DEA agents in the airport concourse was not a seizure of her person implicating the Fourth Amendment, and, even if it was, that the agents had sufficient reasonable suspicion of her involvement in criminal activity to justify a brief detention of her for purposes of further inquiry. In Part II we contend that the move from the airport

concourse to a nearby office was justified by respondent's voluntary consent and, in any event, was a reasonable action under the facts and circumstances known to the officers, and not an arrest requiring probable cause. Finally, in Part III, we argue that respondent's voluntary consent to the search of her person was sufficient to render the search lawful even if the consent was given at a time when respondent was being illegally detained.

I. RESPONDENT WAS NOT ILLEGALLY SEIZED WHEN FEDERAL NARCOTICS AGENTS APPROACHED AND QUESTIONED HER IN THE AIRPORT CONCOURSE

A. Respondent Was Not "Seized" Within The Meaning Of The Fourth Amendment When The Agents Approached Her And Requested To See Her Identification And Airline Ticket

As this Court recognized in its opinion in *Terry* v. *Ohio*, 392 U.S. 1 (1968), not all street encounters between citizens and police officers constitute "seizures" that implicate the protections of the Fourth Amendment. A "seizure" has occurred "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen * * *." 392 U.S. at 19 n.16. As Justice White observed in his concurring opinion in *Terry* (392 U.S. at 34), "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." Justice Harlan noted that, as any other citizen, a policeman has the right to address questions to other persons if the

person addressed has an equal right to ignore his interrogator and walk away. *Id.* at 32-33. See also *Davis* v. *Mississippi*, 394 U.S. 721, 727 n.6 (1969); *Miranda* v. *Arizona*, 384 U.S. 436, 477-478 (1966).

In *Terry*, the Court stated that it was unable to tell from the record whether any "seizure" had occurred when the police officer approached Terry and asked his identity, and it thus assumed that until the officer made physical contact with Terry in frisking him, "no intrusion upon constitutionally protected rights had occurred." 392 U.S. at 19 n.16. Similarly, in *Sibron* v. *New York*, 392 U.S. 40 (1968), the Court again was unable to discern from the record whether Sibron was "seized" when an officer approached him in a restaurant and told him to come outside. The Court suggested that that determination depended upon whether "Sibron accompanied [the officer] * * * voluntarily in a spirit of apparent cooperation with the officer's investigation," rather than in submission to a "show of force or authority which left him no choice." *Id.* at 63. In *Adams* v. *Williams*, 407 U.S. 143 (1972), as well, the Court suggested that a "seizure" did not occur as long as an individual was voluntarily cooperating with the police. In connection with its finding that a forcible stop had occurred in that case, the Court noted that the state did not contend that Williams acted voluntarily in rolling down the window of his car after an officer requested that he open the door. *Id.* at 146 n.1.

These cases certainly suggest that a Fourth Amendment "seizure" does not occur until an individual's

freedom of movement is curtailed or he involuntarily submits to a show of authority. While the Court has not had occasion to define the class of encounters that do not amount to a seizure, it seems clear that a seizure does not necessarily occur whenever an officer identifies himself as such upon approaching an individual.[14] People may cooperate with brief questioning by police either because they feel it is their civic duty or because they feel obliged to defer to authority.[15] Whatever its psychological or sociological wellsprings may be, voluntary cooperation with the police does not constitute an intrusion that implicates the protection of the Fourth Amendment.[16]

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[14] See 3 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment*, § 9.2 at 53 (1978) (hereinafter cited as LaFave):

> [A] street encounter would not amount to a Fourth Amendment seizure merely because * * * one party to the encounter is known by the other to be a police officer.

[15] *The Model Code of Pre-Arraignment Procedure* § 110.1 commentary at 258 (Proposed Official Draft 1975) (hereinafter cited as ALI Model Code), notes that policemen are entitled "to seek cooperation, even where this may involve inconvenience or embarrassment for the citizen, and even though many citizens will defer to this authority of the police because they believe—in some vague way—that they should, [because] the moral and instinctive pressures to cooperate are in general sound and may be relied on by the police."

[16] The fact that the police officer suspects the person approached of criminal activity does not convert a voluntary contact into a "seizure." In *Terry*, *Sibron*, and *Adams*, the contact that the Court indicated might not implicate Fourth Amendment protections was with an individual under suspicion by the police.

While the foregoing general principles are clear enough, their application to particular sets of circumstances is less clear. If, on the one hand, the officer advises the individual he has approached that he is not required to stay or respond to the officer's questions, this would ordinarily suffice to clarify the nature of the encounter as not being a seizure implicating the Fourth Amendment. If, on the other hand, the citizen inquires whether he is free to go and is told that he is not, this too resolves any uncertainty and establishes that a seizure has occurred. The problem arises when, as is common, nothing is said either by the officer or by the citizen clarifying the latter's liberty to go or obligation to stay, and the courts are thereafter confronted with a substantially ambiguous set of objective facts from which they must determine whether a seizure of the person has indeed occurred.

The general analytical framework for the determination whether a particular encounter is a Fourth Amendment seizure (or whether a seizure is an "arrest" rather than merely a *Terry* "stop") seems to be tolerably clear: the determination is to be made by reference to the objective facts and circumstances surrounding the transaction, rather than on the basis of the subjective beliefs or intentions of either the citizen or the officers.[17] The existence of this frame-

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[17] See *United States* v. *Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978), where the court stated that whether a seizure has occurred depends upon "whether the person [approached] was 'under a reasonable

work, while it tells courts what to look for, still does not tell them what to make of cases in which the objective facts surrounding the encounter are ambiguous in their import.

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impression that he [was] not free to leave the officer's presence.'" This test is purely objective: "'what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes.'" *Ibid.*, quoting *Coates* v. *United States*, 413 F.2d 371 (D.C. Cir. 1969).

It has long been established that an objective standard must be used in determining whether an arrest has occurred; the subjective intent of the officer is irrelevant. See *United States* v. *Oates*, 560 F.2d 45, 58 (2d Cir. 1977); *United States* v. *Grandi*, 424 F.2d 399, 401 (2d Cir. 1970); *Coates* v. *United States, supra; Lowe* v. *United States*, 407 F.2d 1391, 1397 (9th Cir. 1969); *Williams* v. *United States*, 381 F.2d 20, 22 (9th Cir. 1967). As the Court stated in *Scott* v. *United States*, 436 U.S. 128, 137 (1978):

> [A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.

Thus the Court found proper the government's contention that:

> [T]he existence *vel non* of [a Fourth Amendment] violation turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. Subjective intent alone * * * does not make otherwise lawful conduct illegal or unconstitutional. [*Id.* at 136-137].

Consequently, Agent Anderson's testimony at the suppression hearing that he would have stopped respondent if she had attempted to leave after producing her driver's license, which did not accord with the name on her ticket (A. 18-19), has no bearing on the determination whether a seizure occurred. See *United States* v. *Wylie, supra*, 569 F.2d at 69 n.7.

This is such a case. Two plainclothes officers approached respondent, identified themselves as federal agents, and asked if they could see her identification. She did not ask whether she was free to go or indicate that she wished to leave, and the officers said nothing on the point; they simply asked their questions, and she answered them. It is our submission that such confrontations are not Fourth Amendment seizures, as a matter of law, in the absence of some facts relating to the officers' actions or the surrounding circumstances, beyond the initial approach and the request for identification or posing of questions, from which the individual could reasonably have inferred that he was not free to leave.[18] We thus agree with Professor LaFave's suggestion that police-citizen encounters should constitute a seizure

> [o]nly if the officer added to those * * * pressures [inherent in any police-citizen encounter] by engaging in menacing conduct significantly

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[18] Nothing in *Brown* v. *Texas*, No. 77-6673 (June 25, 1979), is inconsistent with this analysis. The Court there held that when officers approached Brown on the street and asked him to identify himself, they "seized" Brown for Fourth Amendment purposes. While this conduct by the officers, on its face, does not seem very different from the conduct that *Terry* suggests would not constitute a "seizure," the critical difference is the Texas statute involved in *Brown*. That statute, Tex. Penal Code Ann. § 38.02 (Vernon 1974), made it a crime for Brown to refuse to give his name and address to the officers. Hence, Brown was *ipso facto* seized when the officers approached him and asked his identity; he was compelled by law to answer their inquiry as to his identity or face arrest for his refusal to do so.

> beyond that which is accepted in social intercourse.
>
> Under this approach, the critical inquiry would be whether the policeman, although perhaps making inquiries which a private citizen would not be expected to make, has otherwise conducted himself in a manner consistent with what would be viewed as a nonoffensive contact if it occurred between two ordinary citizens.

3 LaFave, *supra*, § 9.2 at 53.[19]

In the context of DEA airport encounters, two courts of appeals have noted the applicability of the principle that a police contact and propounding of questions does not necessarily rise to the level of a seizure. The Fifth Circuit held, upon facts similar to those in this case, that the initial approach and request for identification and airline ticket was a contact that does not constitute a "seizure." See *United States* v. *Elmore*, 595 F.2d 1036, 1037-1042 (1979), petition for cert. pending, No. 78-6884. The Second Circuit, in *United States* v. *Price*, 599 F.2d 494, 498 (1979), noted but reserved the question. See also *People* v. *Clifford*, 2d Crim. No. 33085 (Cal. App., March 16, 1979). Other courts have found similar contacts not to be seizures in other contexts. See *United States* v. *Wylie*, *supra*; *United States* v. *Brun-*

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[19] Examples of factors that would indicate a seizure even where the individual did not attempt to leave might be the presence of several uniformed officers, the display of a weapon, some physical touching of the individual, or use of tone of voice or language indicating a demand, rather than a request. See generally 3 LaFave, *supra*, § 9.2 at 54.

son, 549 F.2d 348, 356-358 (5th Cir.), cert. denied, 434 U.S. 842 (1977).

In the instant case, we believe that the record shows that respondent had no objective reason to conclude that she was not free to leave the conversation in the concourse, and thus that the agents' initial approach to her did not constitute a seizure. The agents approached respondent in a public concourse of the airport. The agents wore no uniforms and displayed no weapons. They did not summon respondent to their presence, but instead approached her and politely identified themselves as federal agents. They requested, but did not demand, to see respondent's identification and ticket. In short, the agents' conduct did not convey that respondent was not free to go. Moreover, nothing in the record suggests that respondent replied to the agents' requests and questions other than in a spirit of voluntary cooperation. Thus, even were the court of appeals correct in concluding that the facts known to the officers would not have justified a *Terry* stop of respondent—a question to which we turn next—its ruling was erroneous because the initial encounter was not a "seizure" of respondent's person.

B. Even If The Initial Encounter With Respondent Constituted A Fourth Amendment Seizure Of Her Person, It Was Justified By Reasonable Suspicion Of Criminal Activity

This Court has explicitly held in *Terry* and subsequent cases that police officers may briefly detain a person for investigative purposes on less than prob-

able cause, if they have a reasonable suspicion that an individual is engaged in criminal activity. 392 U.S. at 20-27. See *Adams* v. *Williams*, 407 U.S. 143, 146-149 (1972); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880-882 (1975). The suspicion must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" (392 U.S. at 21; footnote omitted). The reasonableness of an officer's conduct can be determined only " 'by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' " 392 U.S. at 21, quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 534-535, 536-537 (1967). The lawfulness of a detention thus depends on consideration both of the facts supporting the suspicion and of the degree and purposes of the intrusion. See also *Delaware* v. *Prouse*, No. 77-1571 (March 27, 1979), slip op. 5. Under these criteria, we believe that the agents had a sufficient reasonable suspicion to detain respondent at the time they approached her.

1. The court of appeals in *McCaleb* (and presumably in this case) held that the agents had no reasonable suspicion that warranted stopping the suspects, noting that the activities observed by the agents "were consistent with innocent behavior." 552 F.2d at 720. It is plainly incorrect to set up consistency with innocent behavior as a standard for determining whether certain conduct gives grounds for reasonable suspicion. See *United States* v. *Price*, *supra*, 599 F.2d at 502. Certainly the facts that this

Court held warranted a stop and frisk in *Terry* or said could justify an automobile stop in *Brignoni-Ponce* were consistent with innocent behavior. Indeed, virtually any set of facts can be said to be "consistent with innocent behavior," even if a high probability of criminal activity is indicated.[20] Clearly, *Terry* does not require a finding of a virtual certainty of criminality to support a stop.

It is possible that the court of appeals may have intended to suggest instead only that reasonable suspicion cannot exist if the observed behavior is more consistent with innocence than with criminality. Thus interpreted, however, the standard would still be incorrect; if the observed or known facts establish a probability of criminality, they would constitute probable cause, see, *e.g.*, *Adams* v. *Williams*, *supra*, 407 U.S. at 148; *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); *United States* v. *Holland*, 510 F.2d 453, 455 (9th Cir.), cert. denied, 422 U.S. 1010 (1975), and it is plain that the quantum of suspicion required for a stop is less than probable cause.

2. The agents in this case did have a reasonable suspicion based on "specific and articulable facts" that warranted stopping respondent for further inquiry. The agents' attention was drawn to respondent when she was the last passenger to deplane from her early morning American Airlines flight. Respondent appeared very nervous as she came off the airplane

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[20] Even the reasonable doubt standard does not require an instruction that the evidence is inconsistent with some conceivable hypothesis of innocent behavior. See *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954).

and completely scanned the whole area where the agents were standing (A. 9, 14). In Agent Anderson's experience, drug couriers often deplane last, particularly on early morning flights, in order to have a clear view of the terminal so that they can more easily detect agents who might be watching them (A. 9). Respondent's plane had arrived from Los Angeles, which was known to the agents to be a major source city for narcotics (A. 8-9). Respondent was not met by anyone, and she proceeded past the baggage claim area to the Eastern Airlines ticket counter (A. 10). Although respondent's airline ticket showed that she was already booked on American Airlines from Los Angeles through Detroit to Pittsburgh, respondent inquired about changing her booking from American to Eastern, keeping Pittsburgh as her destination. Agent Anderson was aware that couriers frequently change airlines and flight times to evade surveillance (A. 10-11).[21] When the ticket agent informed respondent that her ticket did not need to be rewritten, she headed for the Eastern flight departure gate without inquiring about or making any arrangements for the transfer of any luggage from the American to the Eastern flight (A. 11). It was thus fairly inferable that she had no luggage other than her purse. The absence of

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[21] This is presumably thought prudent to guard against the risk that someone has given the authorities a tip that a narcotics courier would be arriving in a given city on a particular flight. See, *e.g.*, *United States* v. *Afanador*, 567 F.2d 1325 (5th Cir. 1978).

luggage on a cross-country trip is unusual and, in the agents' experience, is a common characteristic of drug couriers (A. 8, 10).

Thus, at the time the agents approached respondent, they knew that she had arrived from a source city, that she had apparently taken a cross-country trip without luggage and that she had changed her flight plan for no apparent purpose. They had observed her carefully scan the terminal as if looking for someone, though no one met her, and indeed she was only stopping in Detroit on her way to Pittsburgh. Finally, they had noticed that she exhibited unusual nervousness. These specific facts suggested that respondent was seeking to avoid detection and that she might be engaged in some illicit activity. In addition, several of the facts observed by the agents coincided with facts that agents at the Detroit airport had determined, in their experience, to be common characteristics of drug couriers, often called a "drug courier profile." The district court found that these facts, in the agents' experience, gave them reason to suspect that respondent might be a drug courier,[22] as she in fact proved to be.

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[22] The district court specifically found (Pet. App. 15a):

> [W]hen all of these factors—flight from a source city, last passenger to deplane, the nervous scanning of the entire airport area, apparent lack of luggage although coming from a great distance, the changing of airlines without apparent justification even though in possession of a valid ticket to the same destination—are found to coincide, a *Terry* type intrusion in order to determine [respondent's] identity and obtain more information is justified.

The court of appeals seemed to be troubled by two separate factors in concluding that respondent's observed activities did not give the agents sufficient reasonable suspicion to stop her for questioning. First, the court seemed to consider the correlation with the "drug courier profile" as largely irrelevant, holding specifically that "the so-called drug courier profile does not, in itself, represent a legal standard of probable cause in this Circuit" (Pet. App. 2a). In this case and in *McCaleb*, of course, the court found not only that there was no probable cause, but that there was no reasonable suspicion that could justify an investigative stop. Although we have never suggested that "the drug courier profile, in itself," automatically constitutes either a standard of probable cause or of reasonable suspicion—the reasonableness of a stop must always be measured by the totality of the facts—we do contend that a correlation of observed facts with the drug courier profile should not be disregarded, but is in fact a significant and legitimate consideration in determining the permissibility of a stop.

The failure of the court of appeals to give due consideration to coincidence with the profile may stem from a misunderstanding of its nature and function. The drug courier profile is simply a shorthand compilation of expertise gained by DEA agents in their experience in the detection of drug couriers.[23] It is

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[23] As a factual matter, there is no national profile; each airport unit has developed its own set of drug courier characteristics on the basis of that unit's experience. While many

unthinkable that a police officer's experience should not be given some consideration in examining whether reasonable suspicion exists for an investigative stop. By the same token, it is only good police work for officers to augment their own knowledge by pooling their experience with that of other officers. The profile is simply a method of reducing this cumulative experience to a written or organized form. Thus the profile is not a mechanical substitute for an agent's judgment; rather, it serves to inform that judgment. The reasonableness of each stop must still be measured by the totality of the observed facts, and the coincidence of these facts with profile characteristics does not necessarily make the stop reasonable (*e.g.*, if other observed facts negate the reasonableness of the inferences). But it is equally true that a high coincidence between observed facts and profile characteristics can be quite significant. In practice, the profile has proven to be very effective as an aid to DEA agents in detecting drug couriers.[24]

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of the salient characteristics are common to the guidelines of most, if not all units, there are some differences based on the particular experiences of different units and the peculiar trafficking patterns of each airport. Furthermore, the profile is not rigid, but is constantly modified in light of experience.

[24] Comprehensive statistics on the success of the airport program have not been kept. Those that have been tabulated, however, indicate that it has been quite successful. In *United States* v. *Van Lewis, supra,* the court found (409 F. Supp. at 539) that since the initiation of the program, "agents have searched 141 persons in 96 airport encounters [*i.e.*, encounters where a search ensues] prompted by their use of the courier profile and independent police work. * * * Agents found con-

Police officers often recognize behavior as possibly criminal because their training and experience suggest that similar behavior in the past was indicative of criminal activity. In using their experience, they simply rely on a type of informal mental profile of criminal behavior that they have developed. Similarly, informal profiles are used in other disciplines. A doctor making a diagnosis compares observed symptoms to a profile of characteristics exhibited by various diseases. Use of a "profile" is a legitimate method of using one's experience in an organized fashion to assess the likelihood of a particular conclusion.[25]

Accordingly, the courts have recognized and approved the use of profiles in other contexts.[26] Profiles

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trolled substances in 77 of the 96 encounters and arrested 122 persons for violations of the narcotics laws." Further data demonstrating the success of the program is set forth in Judge Weick's dissent (Pet. App. 4a n.1). See note 1, *supra*.

[25] There can be no justification for establishing a general rule rejecting the use of any profile. Depending on the characteristics included in a profile, coincidence with a profile may even be sufficient to demonstrate probable cause. For example, brandishing a weapon in a bank would no doubt constitute probable cause for arrest. Such conduct would not give any less cause for arrest if it were listed as a factor in a "bank robber's profile."

[26] See, *e.g.*, *State* v. *Ochoa*, 112 Ariz. 582, 544 P. 2d 1097 (1976), which involved the use of a profile to detect stolen vehicles. There, the profile had been developed by representatives of various federal and state agencies in order to stem the flow of stolen vehicles that were being taken to Mexico, where they were either sold or traded for narcotics. The profile was developed from an analysis of the several thousand thefts that had occurred in the Phoenix area during

of "skyjackers" were important and legitimate aids in the early airport security program to reduce the incidence of airplane hijackings.[27] A "smuggling profile" has been properly and successfully used as an aid by the U.S. Customs Service.[28] Indeed, other

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the preceding 17 months. Factors included the type of vehicle, the age of the driver, the fact that the driver would often be alone and carry no luggage, and the fact that the vehicle's license plate would show a registration to one of two Arizona counties. The court held that a coincidence with profile characteristics provided specific and articulable facts which, when taken together with rational inferences therefrom, warranted a brief detention in order to check the driver's license and vehicle registration. Cf. *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975) (fact that model of car fit profile not sufficient to create reasonable suspicion). See also *State* v. *Becerra*, 111 Ariz. 538, 534 P. 2d 743 (1972) (stop by border patrol officers lawful because the combination of circumstances observed fit a "profile" sufficient to sustain a stop and search for illegal aliens).

[27] See, *e.g.*, *United States* v. *Cyzewski*, 484 F.2d 509 (5th Cir. 1973), cert. dismissed, 415 U.S. 902 (1974); *United States* v. *Bell*, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991 (1972).

The hijacking profile was empirically derived from an analysis of known hijackers. Studies indicated that approximately one in 15 persons who was searched after being selected by use of the profile was found to have a weapon. *United States* v. *Lopez*, 328 F. Supp. 1077, 1084 (E.D. N.Y. 1971).

[28] See *United States* v. *Forbicetta*, 484 F.2d 645 (5th Cir. 1973). See also *United States* v. *Asbury*, 586 F.2d 973, 976-977 (2d Cir. 1978); *United States* v. *Kallevig*, 534 F.2d 411 (1st Cir. 1976).

courts have spoken approvingly of the use of the drug courier profile that is involved in this case.[29]

The second factor that seems to have troubled the court of appeals is that the activities observed by the agents, which gave rise to their suspicion, seem fairly innocuous to the layman—hence the court's comment in *McCaleb* that the activities were "consistent with innocent behavior." 552 F.2d at 720. To the extent that the court looks at the activities through the eyes of a layman, however, it errs in disregarding the experience of the agents. It is only to be expected that agents trained and experienced in detecting drug couriers would find significance in facts that the layman might not even notice. In *Brown* v. *Texas*, No. 77-6673 (June 25, 1979), this Court noted the importance of "the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be *wholly innocent* to the untrained observer" (slip. op. 4 n.2) (emphasis added).[30]

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[29] See *United States* v. *Price, supra*, 599 F.2d at 500-501; *United States* v. *Van Lewis, supra*, 409 F. Supp. at 544-545; *State* v. *Reid, supra*. But see *United States* v. *Ballard*, 573 F.2d 913, 915 (5th Cir. 1978).

[30] The district court, in determining that the agents here had probable cause before they searched respondent, noted (Pet. App. 18a):

> To hold otherwise would be to direct DEA Agents to forget all of their training and experience, to ignore the obvious, and to not use all of the education and investigative know-how which they are required to acquire and cultivate in order to obtain and keep their jobs.

There seems little point in training DEA agents in drug enforcement if they are entitled to stop or arrest suspects only on grounds that would be equally apparent to any layman.

There can be no doubt that facts such as those relied upon by the agents in this case are "specific and articulable," and appropriately considered in determining whether a reasonable suspicion exists that justifies an investigative stop. In *United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 884-885, the Court outlined the type of facts that might be relevant in deciding whether to make an investigative stop in the context of searching for illegal aliens. The factors considered in this case are quite similar to those noted in *Brignoni-Ponce.* The knowledge that respondent came from a source city for narcotics is analogous to the factor in *Brignoni-Ponce* concerning the "characteristics of the area" where the vehicle is found and its "proximity to the border." In *Brignoni-Ponce,* the Court noted the relevance of "the driver's behavior" and "attempts to avoid officers"; here, respondent was observed to be nervous, scanning the terminal as if looking for someone, and making flight arrangements that could well have been designed to avoid surveillance. The Court also noted that "aspects of the vehicle" may provoke suspicion; here the agents noted the unusual absence of luggage. Finally, the Court emphasized in *Brignoni-Ponce* that "[i]n all situations the officer is entitled to assess the facts in light of his experience." 422 U.S. at 885.

On the facts in *Brignoni-Ponce*, the Court held that the mere fact that the suspects appeared to be of Mexican ancestry was not a cause for suspicion sufficient to differentiate the stop from a random stop. 422 U.S. at 883, 885-886. Here, in contrast, the agents relied on the combination of several different factors that they found to be significant. The facts noticed by the agents here would occur in only a small percentage of airplane passengers, as compared with the broad applicability of the Mexican ancestry factor relied on by the agents in *Brignoni-Ponce*.

Finally, it must be emphasized that the facts observed by the agents must be considered together and in context, rather than individually. Each individual fact observed by the agents may well have been unremarkable, but taken together, with the additional knowledge that several of the factors were known to be associated with drug couriers, they provided a reasonable suspicion that respondent was a drug courier. See *United States* v. *Price*, 599 F.2d 494, 501 (2d Cir. 1979); *United States* v. *Oates*, 560 F.2d 45, 61 (2d Cir. 1977).[31] The agents' observations are considered significant only in a context; an agent noticing similar behavior on the street would

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[31] See also *United States* v. *Hall*, 525 F.2d 857, 859 (D.C. Cir. 1976), where the court stated:

> [I]n judging the reasonableness of the actions of the officer the circumstances before him are not to be dissected and viewed singly; rather they must be considered as a whole. So considered they are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.

not necessarily suspect any criminal activity. However, the observation of respondent's behavior after deplaning from a flight arriving from a major source city for narcotics, coupled with the knowledge of common drug courier characteristics, suggested to the agents that respondent might be a drug courier.

It is hardly surprising that respondent did not engage in any conduct that would have been highly suspicious to an untrained observer. In *Terry*, the activities of the defendant that led the police officer to suspect him of planning a robbery might also have aroused some suspicion in a layman. However, the crime involved, armed robbery, was one of action. At some point, at least by the time he robbed the store, Terry would have to have taken action that was clearly grounds for suspicion by anyone. In contrast, respondent here needed to take no action to complete her crime. Her only goal was to avoid detection, to do as little as possible. It is hardly reasonable to expect her to have drawn attention to herself in any way that would be obvious to a casual observer. The only way that a competent drug courier can reasonably be expected to give himself away is through subtle behavior that a trained agent might notice. In refusing here to credit the articulable suspicion of the agents based on their experience, the court has, in effect, established a requirement of probable cause for an investigative stop.[32] In dealing with

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[32] The court seems to acknowledge this requirement in its holding that the "drug courier profile does not, in itself, represent a legal standard of probable cause" (Pet. App. 2a). See also *McCaleb, supra,* 552 F.2d at 720.

a crime such as the smuggling of drugs, which is based only upon concealment and escaping detection, this standard will be practically impossible to satisfy. The result of such a standard can only be to destroy the effectiveness of a program that has proven to be highly successful in intercepting a significant number of shipments of illicit drugs.

3. Finally, the court of appeals apparently made no attempt to balance the intrusion here against the government interest involved. The reasonableness of a seizure that does not require probable cause "depends on a balance between the public interest and the individual's right to personal security." *Brignoni-Ponce, supra,* 422 U.S. at 878. See also *Dunaway* v. *New York,* No. 78-5066 (June 5, 1979), slip op. 8; *Pennsylvania* v. *Mimms,* 434 U.S. 106, 109 (1977); *Terry, supra,* 392 U.S. at 21. This balancing involves a "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown* v. *Texas, supra,* slip op. 3.

We have argued above that the agents' initial approach to respondent did not constitute a "seizure" at all within the meaning of the Fourth Amendment. Assuming, however, that it was a seizure, it surely must rank as one of the least intrusive encounters that is protected by the Fourth Amendment. The agents politely asked to see respondent's identification and her ticket and asked her one or two other simple questions. The agents did not touch her. The

entire exchange, until respondent consented to be searched, lasted no more than six minutes. In contrast, the intrusion approved by this Court in *Terry* was significantly greater. The stop itself in *Terry* was considered a relatively minor intrusion; the significant intrusion was the frisk, which was characterized by the Court as a "severe" intrusion. 392 U.S. at 24. The Court stated (392 U.S. at 23):

> The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation.

Yet even the frisk in *Terry* was held to be warranted by the suspicious activity observed by the officer. We submit that a lesser degree of cause for suspicion is required in this case, where the encounter was significantly less intrusive than that in *Terry*.[33]

Balanced against this limited intrusion is the important government interest in controlling illegal drug trafficking. The devastating societal impact of the enormous narcotics trade in this country is well documented.[34] As the court said in *United States* v.

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[33] See *United States* v. *Nieves*, No. 79-1051 (2d Cir. October 30, 1979), where the court noted that an itinerary suggestive of wrongdoing and inadequate luggage established a degree of reasonable suspicion sufficient to justify the minimal intrusion of removing one's shoes. Slip op. 5325 n.6.

[34] See generally W. Seymour, *The Young Die Quietly: The Narcotics Problem in America* (1972).

Oates, supra, 560 F.2d at 59, the costs "in terms of ruined and wasted lives are staggering." The airport surveillance program has proven to be an effective tool in fighting the drug traffic. Over 130 pounds of heroin were seized at the Detroit airport alone under the program between 1975 and 1978 (Pet. App. 4a n.1). The government has a strong interest in continuing this program.

Moreover, the airport surveillance program cannot succeed without the use of investigative encounters of the type that occurred in this case. *Terry* teaches that an important element in the reasonableness analysis is consideration of "the scope of the particular intrusion, in light of all the exigencies of the case." 392 U.S. at 18 n.15. Generally, DEA agents have no advance warning of a courier's arrival; they are alerted to a suspect's presence only by his behavior. The agents have no way of knowing the suspect's name or address without briefly questioning him. Because of the distances involved and the readily disposable nature of the drugs, following the suspect is usually not a practical alternative. As the suspect prepares to leave the airport, the need for an investigative stop increases. See *United States* v. *Oates, supra,* 560 F. 2d at 59; *United States* v. *Magda,* 547 F. 2d 756, 759 (2d Cir. 1976), cert. denied, 434 U.S. 878 (1977); *United States* v. *Santana,* 485 F. 2d 365, 368 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974).

We submit that the stop by the agents in this case was reasonable. The agents were aware of "specific and articulable facts" that enabled them reasonably

to suspect respondent within the meaning of *Terry*. Moreover, the minimal nature of the intrusion here, balanced against the strong government interest at stake, suggests that substantially lesser grounds for suspicion than existed here would reasonably warrant an investigative stop. The ruling of the court below that the stop in this case was unreasonable sets an unrealistically difficult standard for an officer to meet. It will severely hamper the ability of officers to investigate suspicious circumstances and, in this context, will severely curtail the use of one of the government's most effective weapons in combating the illegal drug trade.

II. RESPONDENT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN SHE AND THE AGENTS WENT FROM THE AIRPORT CONCOURSE TO THE NEARBY DEA OFFICE

In the preceding section we have contended that the initial encounter between the DEA agents and respondent in the airport concourse entailed no infringement of her Fourth Amendment rights. Assuming we are correct in this, the question remains whether a violation occurred when respondent and the agents went from the concourse to the nearby DEA office. The court of appeals in this case presumably adopted the conclusion of *McCaleb* that, regardless of the lawfulness of the initial encounter, the agents' request that the individual accompany them to the office converts the situation into an arrest requiring probable cause (see 552 F.2d at 720).

We submit that the conclusion that an illegal arrest or detention occurred at this point is in error on several grounds: First, the court failed to give due effect to the district court's finding that respondent voluntarily consented to go to the office; second, the court applied an incorrect standard for determining whether the conduct in question, even if not validated by a voluntary consent, constituted an arrest requiring probable cause; and third, viewing the change of situs as an extension of a lawful *Terry* seizure of respondent's person, the action was reasonable under the circumstances and therefore consonant with the Fourth Amendment.

A. Respondent's Voluntary Consent To Move To The DEA Office Obviates Any Fourth Amendment Objection That Might Otherwise Be Available

After looking at her driver's license and airline ticket, which revealed that respondent was traveling under an alias, Agent Anderson asked respondent if she would accompany him to a nearby office for further questioning, which she did. The district court specifically found that she accompanied the agents to the office " 'voluntarily in a spirit of apparent cooperation' " (Pet. App. 16a). Thus, respondent voluntarily consented to any incremental intrusion in her freedom of movement that was entailed in going to the office.

In determining that the move from the concourse to the office constituted an arrest, the court of appeals did not disapprove—or even consider—the district court's finding of voluntary consent. While the

court's silence on the point makes it difficult to be certain why it failed to consider the consent, other decisions suggest that the Sixth Circuit considers the suspect's freedom to leave to be an overriding and dispositive factor.[35] Apart from the fact, as we next discuss (pages 48-50, *infra*), that an individual's freedom to leave is not dispositive of whether an arrest has occurred, there are several difficulties with the use of this factor as a basis for nullifying respondent's consent.

First, to the extent that the alleged illegality consists of moving the situs of the interview from the concourse to the DEA office, the relevant inquiry is not respondent's freedom to leave (either at the concourse or after arriving at the office), but her freedom to decline the request to move to the office. The court did not find that she was not free to refuse this request, and the record contains no evidence that would support such a finding.[36]

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[35] In *United States* v. *Smith*, 574 F.2d 882, 886 n.15 (6th Cir. 1978), the Sixth Circuit held, on similar facts, that a transfer to the DEA office was not an arrest because the subject went voluntarily. See also *United States* v. *Canales*, 572 F.2d 1182 (6th Cir. 1978). *McCaleb* was distinguished on the ground that the defendants there were not free to leave.

[36] Respondent's freedom to leave is relevant to the right of the officers to detain respondent at any point in the encounter, since the question whether there was any seizure of her person turns upon that factor. But at the point when she was asked to go to the office, by which time it was known that she was traveling under an assumed name, there can be little doubt that a reasonable suspicion of criminal activity existed justifying a *Terry* stop, with its concomitant lawful restriction on freedom of movement.

When a person voluntarily consents to an action by a police officer, that action is lawful under the Fourth Amendment without regard to the presence of a warrant, probable cause, or other substantive or procedural prerequisites to the search or seizure that the Fourth Amendment might command in the absence of consent.[37] Consequently, the change of situs here can be challenged as violative of the Fourth Amendment only if the district court's finding that respondent voluntarily consented to accompany the agents is clearly erroneous.

The question of the validity of a Fourth Amendment consent is ordinarily a question of fact to be determined by a consideration of the totality of the circumstances surrounding the consent. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). There is nothing in the record of this case that suggests that respondent's consent to go to the office was coerced in any way. Respondent herself did not testify at the hearing (Pet. App. 18a-19a). The government's evidence showed that respondent was not told that she would have to go, but was politely asked if she would accompany the officers. There were no threats or show of force. She had been subjected to only brief questioning before agreeing to accompany the agents. While the officers did testify that she was nervous, the totality of the evidence was plainly sufficient to sup-

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[37] We assume in making this point that there is no claim that the consent is the fruit of an antecedent Fourth Amendment violation. Such a claim would raise a different issue, analogous to that addressed in Part III, *infra*.

port the district court's finding that her consent was the product of her own free will.[38]

Second, and perhaps more fundamentally, the court's decision is premised upon an erroneous resort to the officers' subjective intentions for determining whether respondent was free to leave. There is testimony by Agent Anderson that, after respondent had agreed to go to the DEA office, the agents would not have permitted her to leave (A. 19). Given their well founded suspicion of criminal activity at that juncture, they would have been within their rights to restrain her; but even if they would not have been, it is not proper to rely on what the agents would have done had they not procured consent as a basis for determining the validity of the consent. An agent who knocks on the door of a house and asks for consent to search it manifestly does not act illegally in accepting a voluntarily given consent, even if he would have conducted the search without any consent. That is the teaching of *Scott* v. *United States*, 436 U.S. 128 (1978), and the line of cases that *Scott* follows. See note 17, *supra*. Accordingly, because the record here affords no basis for concluding that a reasonable person in respondent's situation would have felt compelled to accompany the agents to the office, the dis-

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[38] *Dunaway* v. *New York*, *supra*, is not to the contrary, since the Court there relied upon the trial court's finding in holding that Dunaway was "taken involuntarily" to the police station (slip op. 3, 5, 6 n.6).

trict court's finding of voluntary consent is unassailable.[39]

B. The Sixth Circuit's Standard For Determining Whether An Arrest Has Occurred Is Incorrect

The court in *McCaleb* concluded that even if the initial encounter there was a valid *Terry* stop, the agents' request that the individuals accompany them to a nearby private room converted the stop into an arrest requiring probable cause.[40] Specifically, the court held that when the individuals "were taken to the private office and were not free to leave, the arrest was clearly complete." 552 F.2d at 720. Wholly apart from the consent issue discussed above (pages

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[39] The error of relying upon the agent's subjective intention (*i.e.*, on what would have happened had consent been withheld) as dispositive of the validity of the consent may be illustrated by the following hypothetical. Suppose the agent had not only asked the respondent if she would go to the office, but had specifically stated that she was free to refuse to do so. Suppose further that, having been so advised, she had nevertheless agreed to go. Surely her consent, if otherwise voluntary, would be unassailable in these circumstances—even if the agent had been lying when he told her she could refuse to go and in fact had every intention of taking her forcibly if she withheld consent.

[40] The term "arrest" may be used in different ways. Usually it refers to the formal act by which a person is charged with an offense and taken into custody for that offense. It is also used, however, as it is in this context, to refer to that degree of detention for which the Fourth Amendment requires probable cause, whether or not a formal charge is brought. See *Dunaway* v. *New York*, *supra*, slip op. 6-8.

43-47, *supra*), the Sixth Circuit's holding on this point is incorrect in two respects.

1. ***Whether There Has Been an Arrest Requiring Probable Cause Does not Necessarily Depend on Whether a Detained Individual is Free to Leave***

In *Terry* v. *Ohio*, *supra*, the Court recognized the principle that certain police conduct may constitute a "seizure" under the Fourth Amendment yet not require probable cause. The Court left no doubt that such a "seizure" involves some restraint on the freedom of the individual to walk away. 392 U.S. at 16. As Justice White stated in his concurring opinion (392 U.S. at 34), "given the proper circumstances, * * * the person may be briefly detained against his will while pertinent questions are directed to him." See also *Brown* v. *Texas*, *supra*, slip op. 3. In fact, as we have argued above (Part I(A), *supra*), when an individual is free to leave an encounter with a police officer, that encounter is not a "seizure" that implicates the protections of the Fourth Amendment at all. The test that has commonly been applied in determining whether a given police encounter rises to the level of a *Terry* stop is whether a reasonable man would conclude that he was not free to leave the officer's presence. See, *e.g.*, *United States* v. *Price*, *supra*, 599 F. 2d at 498; *United States* v. *Elmore*, *supra*, 595 F. 2d at 1041-1042; *United States* v. *Wylie*, *supra*, 569 F. 2d at 68.

The Sixth Circuit seems to analyze the question whether there has been an arrest in terms of the

degree to which an individual's freedom of movement is restrained,[41] but this approach is unworkable. An individual is either free to go or he is not. The fact that an individual's freedom to leave during a detention in a private office for further questioning may be restrained, for a brief period, to the same extent that it would be if he were arrested does not imply that the detention requires probable cause. The severity of an intrusion must depend to a great extent on its expected duration, which is quite different in the case of a brief detention than in the case of an arrest. An arrest "is inevitably accompanied by future interference with the individual's freedom of movement." *Terry, supra,* 392 U.S. at 26. As one leading authority has stated:

> The typical stopping for investigation cannot be viewed as anything but a complete restriction on liberty of movement for a time, and if investigation uncovers added facts bringing about an arrest, the early stages of the arrest will not involve any new restraint of significance * * *.

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[41] The court in *McCaleb* stated (552 F.2d at 720) (citations omitted):

> Appellants were not free to leave at any point after the initial stop by the agents. As this court stated in *Manning* v. *Jarnigan,* 501 F.2d 408 (6th Cir. 1974), "[t]he difference between an investigatory stop and an arrest has yet to be spelled out . . . [However], this was clearly a deprivation of liberty under the authority of law. It does not take formal words of arrest or booking at a police station to complete an arrest." When appellants were taken to the private office and were not free to leave, the arrest was clearly complete.

A stopping for investigation is not a lesser intrusion, as compared to arrest, because the restriction on movement is incomplete, but rather because it is brief when compared with arrest, which (as emphasized in *Terry*) "is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." [42]

2. *Moving an Individual From the Location of a Terry Stop to a Nearby Office Does Not Necessarily Effect an Arrest*

A *Terry* stop based on reasonable suspicion not amounting to probable cause is constitutionally permissible because it is a lesser intrusion upon an individual's freedom than an arrest. As noted above, the most significant factor in determining whether a detention reaches the level of an arrest is its duration, which is completely within the control of the officer. The location of a stop, on the other hand, depends largely upon circumstances, relating to the officer's acquisition of a reasonable suspicion of criminal activity, that are typically not within the officer's control. Thus, if a *Terry* stop is made in the middle of a busy street, it will likely be necessary for the officer to move the individual to another location. Such a movement does not materially or unreasonably increase the intrusion or *ipso facto* convert it into an arrest requiring probable cause.[43]

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[42] 3 LaFave, *supra*, § 9.2 at 29-30.

[43] The right of an officer to stop an individual on reasonable suspicion includes the right to use reasonable force in restraining the individual from departing. This is implicit in

This Court has recognized that an individual may legitimately be asked to make some movement from the location at which he is stopped, even if only for the convenience and safety of the officers, without any additional reason for suspicion other than the reasons that occasioned the stop. Thus, in *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977), an officer who had made a valid stop of the driver of an automobile could legitimately order the driver to get out of the car. Similarly, in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976), the Court held that cars passing through a highway checkpoint could be selectively directed to a secondary inspection area, even without any reason for suspicion at all. Clearly, a minor movement of an individual from the location

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the idea of a "forcible stop." See *Adams* v. *Williams*, *supra*, 407 U.S. at 147; *Terry*, *supra*, 392 U.S. at 32 (Harlan, J., concurring). The ALI Model Code provides for the "use [of] such force, other than deadly force, as is reasonably necessary to stop any person or vehicle or to cause any person to remain in the officer's presence." The reason for allowing the use of such force is that "it would be frustrating and humiliating to the officer to grant him an authority to order persons to stop, and then ask him to stand by while his order is flouted." ALI Model Code, *supra*, § 110.2(3) and commentary at 284-285. The courts generally have adopted the same position. See *United States* v. *Thompson*, 558 F.2d 522 (9th Cir. 1977); *United States* v. *Purry*, 545 F.2d 217 (D.C. Cir. 1976); *United States* v. *Worthington*, 544 F.2d 1275 (5th Cir. 1977); *United States* v. *Richards*, 500 F.2d 1025 (9th Cir. 1974); *United States* v. *Lee*, 372 F. Supp. 591 (W.D. Pa. 1974). In a situation where the use of some force may be proper, it is illogical to maintain that the removal of an individual to a nearby office, without force, is *per se* improper.

at which he is stopped cannot *per se* convert the stop into an arrest. As the Court said in *Mimms*, "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" 434 U.S. at 108-109.

Of course, the fact that an arrest requiring probable cause cannot be found simply upon the basis that a detained suspect has been moved to another location does not answer the question whether what transpired in any given case may have been sufficiently intrusive to amount to an arrest or may otherwise have been unreasonable or unjustified under the Fourth Amendment. It is to these case-specific questions that we now turn.

C. Moving Respondent To A Nearby Office Was Reasonable In The Circumstances Of This Case

Even assuming that respondent's consent to go to the office was not effective, the move was reasonable under the circumstances and did not violate respondent's Fourth Amendment rights. As we have argued above (pages 26-42, *supra*), any "seizure" of respondent in connection with the initial questioning in the airport concourse was lawful because of the reasonable suspicion that she might be carrying drugs. Because a "seizure" of respondent was proper, and resort to the warrant procedure impossible, the Fourth Amendment inquiry pertinent at this juncture is whether the nature of that seizure—here, specifically, the transfer to the DEA office—was unreasonable. See *Terry*, *supra*, 392 U.S. at 19-20. The

inquiry here ~~thus~~ "must therefore focus not on the intrusion resulting from the request to stop * * * but on the incremental intrusion resulting from the request to [accompany the agents to the office] once [respondent] was lawfully stopped." *Pennsylvania* v. *Mimms, supra,* 434 U.S. at 109. The incremental intrusion resulting from a transfer of an individual may, in some cases, be unreasonable unless it is supported by probable cause, even if the individual is not technically placed under arrest. See *Dunaway* v. *New York, supra.* The transfer in this case, however, does not approach the level of intrusiveness of the transfer in *Dunaway,* and it was reasonable under the circumstances.

Since *Terry* v. *Ohio, supra,* it has been established that an individual may be stopped on facts that do not constitute probable cause, for the purposes of a brief investigation of suspicious circumstances. See *United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 881. *Terry* stated that the central Fourth Amendment inquiry in the case of such a governmental intrusion that is not a "technical arrest" is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." 392 U.S. at 19. See also *Mimms, supra,* 434 U.S. at 109. The focus of this inquiry is a "balancing test" (see *Dunaway, supra,* slip op. 8), whether "the scope of the particular intrusion" is justified "in light of all the exigencies of the case." 392 U.S. at 18 n.15. In addition, the stop must be "reasonably related in scope to the circumstances which justified the

interference in the first place." *Terry, supra,* 392 U.S. at 20.

In *Pennsylvania* v. *Mimms, supra,* the Court found that the increased degree of safety for the officer occasioned by requiring the driver to get out of his car warranted the additional intrusion into the driver's personal liberty. The Court concluded (434 U.S. at 111; footnote omitted):

> We think this additional intrusion can only be described as *de minimis* * * *. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "'petty indignity.'" *Terry* v. *Ohio, supra,* at 17. What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Comparing the action in this case to that in *Mimms,* the removal of a suspect to a private office approximately 50 feet away may or may not be a greater inconvenience than ordering a driver to get out of his car, depending on the circumstances.[44] In any event,

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[44] The fact that the distance traveled in walking to the airport office is greater than that traveled in stepping out of a car does not alone establish that the former is a greater intrusion. A driver may be asked to step out of his car in inclement weather or at the side of a busy highway where his proximity to fast-moving traffic may make him quite uneasy. The driver of a car expects to remain in his car, and to make

the Court in *Mimms* suggests that a greater intrusion than the one involved there, characterized as "a mere inconvenience," would be permissible if the intrusion were balanced against other important considerations. The transfer here is supported by policy reasons that are as persuasive as the safety factor in *Mimms* and that cannot be vindicated in a less intrusive fashion. First, any contact with a suspected drug courier carries a potential for danger. Moving the suspect out of the terminal area lessens the danger of injury to the public that could result from a confrontation and any danger to the officers that might arise from the presence at the airport of unknown confederates of the detained person.[45] Second, speaking and listening

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him get out is an intrusion. An individual who has just gotten off an airplane, however, does not expect to remain stationary; he would no doubt expect to walk considerably more than 50 feet before eventually leaving the airport.

[45] In his dissenting opinion below Judge Weick stated (Pet. App. 5a) that "[t]he reason [for such a request] is that the agent must comply with airport regulations which are designed to prevent public confrontation and injury [to the public] which may result therefrom." As a factual matter, there are no airport regulations as such that control DEA conduct in this regard. Judge Weick was probably referring to the testimony of DEA Agent Paul Markonni in *United States* v. *Camacho*, No. 78-5081 (October 18, 1978), which was briefed and argued in the court of appeals as a companion case to this one. Agent Markonni testified during the suppression hearing in *Camacho* that Detroit airport authorities had requested the DEA to conduct its questioning of suspects and any searches away from the public areas of the terminal in order to ensure the safety of the public and to prevent embarrassment to the individuals detained.

in a noisy airport terminal is difficult for both the officer and the person detained; a conversation can best be conducted in a location free from such distractions. Third, the officers, who often patrol the same airport, have an interest in not attracting attention to themselves in the terminal. Finally, conducting the investigation away from public areas of the terminal prevents any unnecessary embarrassment to the person detained.[46] This is especially relevant where, as here, the initial questioning by the agents heightens their suspicion to such a degree that they deem it appropriate to request the individual's permission to search his luggage or his person.[47] We submit that these concerns are ample justification for the minimal intrusion involved here in moving an in-

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[46] See generally *United States* v. *Chatman*, 573 F.2d 565, 567 (9th Cir. 1977) ("it was not improper * * * to arrange that [the interrogation of a suspect stopped in the airport] take place free from public view with its attendant embarrassment"); *United States* v. *Oates*, *supra*, 560 F.2d at 57 (proper to move suspects into a nearby office, a place more conducive to insuring the safety of other passengers in the crowded departure area); *United States* v. *Van Lewis*, *supra*, 409 F. Supp. at 545 ("There are many cogent reasons for not interrogating travelers in the hustle and bustle of the airport's public areas. These involve the safety of both parties, the ability to converse effectively, the embarrassment to the person detained, and others.").

[47] The Sixth Circuit has recognized that requesting consent to search is permissible police conduct during a lawful *Terry* stop. See *United States* v. *Smith*, *supra*, 574 F.2d at 886 n.15 (6th Cir. 1978). The Sixth Circuit's objection to the consent search in this case derives solely from the premise that there was an unlawful detention.

dividual from the concourse to a nearby office. No further cause for suspicion is necessary beyond that which justified the stop.[48]

The circumstances of this particular case provide further justification for the action of the agents in moving the location of the interview to the office. When they began to question respondent in the airport terminal, the agents immediately discovered that she was traveling under an alias, for which she gave no satisfactory explanation. The agents also discovered that respondent had been in California for only two days, an unusually short stay. These facts heightened the agents' already reasonable suspicion that respondent was carrying drugs. At this point, one agent identified himself as a narcotics agent and observed that respondent thereupon became extremely nervous. Only then did the agents request respondent to accompany them to the DEA office. The entire encounter with the agents, from the time respondent was approached until she consented to the search in the office, took only 5 to 6 minutes.

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[48] See, *e.g.*, *United States* v. *Wylie*, *supra*, 569 F.2d at 69-71, in which the court stated that a police officer who had stopped an individual because of his strange behavior inside a nearby bank, could compel the suspect to re-enter the bank for purposes of making a brief investigation. See also ALI *Model Code of Pre-Arraignment Procedure* § 110.2(1) (Proposed Official Draft, 1975), which provides that during a *Terry* stop an officer may "order a person to remain in the officer's presence [or] near such place * * *." As the draftsmen explained, the concept is intended to be flexible, and gives the officer the authority to order a person stopped on the street to a nearby place, such as the officer's patrol car or police call box.

The determination that the move to the DEA office did not give rise to an arrest requiring probable cause is consistent with this Court's decision in *Dunaway* v. *New York, supra.* In *Dunaway,* on the basis of a lead that suggested Dunaway's involvement in a murder but did not establish probable cause to arrest, three police detectives were ordered to "pick up" Dunaway and "bring him in." The detectives located Dunaway at a neighbor's house, placed him in a police car, and drove him to police headquarters. Although he was not told that he was under arrest, he was placed in an interrogation room, where he was questioned by officers after having been advised of his *Miranda* rights.

Even though Dunaway had not been formally arrested, the Court ruled that his detention violated the Fourth Amendment because it was not supported by probable cause. *Dunaway* thus makes clear that some intrusions upon the freedom of an individual are of such a magnitude that they require probable cause under the Fourth Amendment, whether or not they are technical arrests. As was recognized in *Dunaway,* however, other seizures within the purview of the Fourth Amendment, analogous to the intrusions in *Terry* and its progeny, do not require probable cause. Slip op. 11.

The limited intrusion resulting from the movement to the office in this case does not approach the magnitude of the intrusion in *Dunaway* and was clearly reasonable under the circumstances. First, the respective justifications for the two intrusions were

quite different. Respondent was subjected to a lawful *Terry* stop in a public area for brief questioning because her conduct aroused the suspicion of trained agents. The agents had to act quickly, or else the opportunity to prevent respondent from successfully completing her delivery of drugs would have been gone. The agents did not request that respondent come to the office until they had asked her a few questions that heightened their suspicions, and, moreover, there were important safety and other reasons for requesting her to move to the nearby office. In contrast, the police in *Dunaway* acted on a tip; there was no need to question him at any particular time and no reason not to question him at his neighbor's house. Yet, as the Court found significant, he was not "questioned briefly where he was found" (slip op. 11), but was immediately seized and taken to the station.

The physical move in *Dunaway*—involving a drive to the police station rather than walking a few feet—was much more intrusive than the one here. Dunaway was also detained for an hour before the police even began to question him. *People* v. *Dunaway*, 61 App. Div. 2d 299, 302, 402 N.Y.S. 2d 490, 492 (1978). The psychological impact of being herded into a police car, taken to police headquarters, and placed in an interrogation room is quite severe, as compared to simply being asked to step from a busy airport concourse into a nearby private room.

Finally, the character and duration of the intrusions were quite different. *Dunaway* clearly involved

a "custodial interrogation." Dunaway was taken to an interrogation room at the station, given *Miranda* warnings, and questioned for about an hour (see slip op. 6 (Rehnquist, J., dissenting); *People* v. *Dunaway*, *supra*, 61 App. Div. 2d at 303, 402 N.Y.S. 2d at 493 (Denman, J., concurring)) before he made an incriminating statement. Here, the questioning was conversational, rather than in the nature of an interrogation, and was quite brief, amounting to a total of only five or six minutes including the questioning on the concourse.

As we have noted above, a critical feature of a detention that often determines its intrusiveness is its duration. See 3 LaFave, *supra*, § 9.2 at 30-31. See also *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 880. A *Terry* stop is valid only when it is for the purpose of a brief investigation of the suspicious circumstances. The ALI Model Code *supra*, § 110.2(1) suggests 20 minutes as a standard for the appropriate length of a *Terry* stop, but the exact duration that converts a *Terry* stop into an intrusion so substantial as to require probable cause may vary, depending upon the circumstances, and must be determined on a case-by-case basis. This case, however, does not present a close question on this issue. Although the two hour detention in *Dunaway* (which might have continued indefinitely if Dunaway had not made an incriminating statement) was a detention equivalent to an arrest and requiring probable cause, it is clear that the six minute detention in this case did not rise to such a level. In sum, *Dunaway* does not estab-

lish that the agents' conduct in moving respondent was improper.

Both the Ninth and Second Circuits have concluded that moving an individual from an airport terminal to a nearby room does not constitute an arrest. *United States* v. *Chatman*, 573 F. 2d 565, 567 (9th Cir. 1977); *United States* v. *Nieves*, No. 79-1051 (2d Cir. October 30, 1979); *United States* v. *Oates*, *supra*. Other courts have recognized the propriety of similar movements in other contexts.[49] Clearly, a *per se* rule that a *Terry* stop is converted into an arrest whenever an individual is moved from the location at which he is stopped cannot be maintained. In certain cases, movement is almost unavoidable—for example, when a suspect stopped by the police in the middle of a large and hostile crowd is moved to a safer place for questioning. Other movements, such as the one in *Dunaway*, are unnecessary and improper. The test must be the reasonableness of the

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[49] See *United States* v. *Short*, 570 F.2d 1051, 1054 (D.C. Cir. 1978) (pursuant to a *Terry* stop, suspect may be taken to nearby scene of burglary for possible identification); *United States* v. *Wylie*, *supra*, 569 F.2d at 70 (officer who made *Terry* stop on street outside bank could take suspect back into bank for questioning); *United States* v. *O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976) (reasonable to move suspect to station for brief detention while awaiting the arrival of more experienced agents); *United States* v. *Salter*, 521 F.2d 1326, 1328-1329 (2d Cir. 1975) (suspect stopped at bus station could be taken to nearby baggage room for questioning); *People* v. *Stevens*, 183 Colo. 399, 407, 517 P.2d 1336, 1340 (1973) (proper to take a suspect stopped in prison lobby to nearby conference room for questioning).

movement in the circumstances of the case. In this case, the agents' action in moving respondent to a nearby office was reasonable, apart from her voluntary consent to go there.

III. RESPONDENT EFFECTIVELY CONSENTED TO THE SEARCH OF HER PERSON, REGARDLESS OF THE LEGALITY OF HER DETENTION

In concluding that respondent gave "no valid consent to search within the meaning of *McCaleb*," the court below apparently relied solely on the theory that the otherwise voluntary consent was a "fruit of the illegal arrest." 552 F.2d at 721. As the court did not discuss the particular facts of this case, which were quite different from those in *McCaleb*,[50] it apparently has concluded that a voluntary consent to search can never be effective if the preceding detention is unlawful. Such a *per se* rule is at odds with the decisions of this Court in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), and *Brown* v. *Illinois*,

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[50] Three factors other than the unlawful detention were relied on by the court in *McCaleb* to invalidate the consent there, but are absent here. These factors were the agent's statement, in response to McCaleb's query as to what would happen if he refused consent, that the agent would attempt to obtain a warrant; the fact that McCaleb merely unlocked the suitcase but did not open it himself; and the fact that McCaleb did not orally acquiesce in the search. 552 F.2d at 721. Here, in contrast, respondent was not led to believe that she would be further detained if she refused to consent, she twice verbally consented to the search (A. 12, 24), and she handed the packages of heroin to the policewoman conducting the search.

422 U.S. 590 (1975).[51] If this Court concludes that we are mistaken in our belief that respondent's consent was given at a time when she was not being illegally detained, and hence goes on to consider whether her consent was invalid as the "fruit" of an illegal detention, we submit that respondent's consent was valid and effective to attenuate any antecedent taint. It was freely and voluntarily given under the standards of *Schneckloth* and was not obtained through an exploitation of an illegal detention under the standards of *Brown*.

A. Respondent's Consent Was Voluntary

The essential facts here are undisputed. After respondent agreed to accompany the agents to the nearby office, she was asked if she would consent to a search of her person and her handbag, and she was advised that she had the right to decline the search if she so desired. Respondent verbally consented to the search. Following the search of her purse, which disclosed additional suspicious information but no contraband, a female police officer arrived to search respondent's person. Before the policewoman searched respondent, she again asked respondent if she consented to the search, and respondent replied that she did.

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[51] The Court stated in *Brown* (422 U.S. at 603): "we also decline to adopt any alternative *per se* or 'but for' rule. * * * The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case." See also *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 268, 273 (1973) (implying that a search by consent would be valid after a stop without reasonable suspicion).

The district court found (Pet. App. 16a) that respondent's consent was "freely and voluntarily given" under the standards established in *Schneckloth* v. *Bustamonte, supra.* There is no basis in the record for disturbing this finding (nor did the court of appeals purport to do so). The *Schneckloth* inquiry focuses on whether, in light of "the totality of the circumstances," the consent is truly voluntary or it is instead induced by duress or coercion. In this case, only five or six minutes transpired from the time respondent was approached until she consented to the search. She was 22 years old with an eleventh grade education and thus certainly capable of a knowing consent (A. 13). She was no stranger to law enforcement procedures, having been arrested twice before. No threats were made to induce her consent; on the contrary, she was twice notified of her right to refuse.[52] The fact that she was in the DEA office when she consented, although a factor to be considered, does not necessarily imply that her consent was coerced.[53] In *United States* v. *Watson*, 423 U.S.

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[52] Upon being told that the search would require the removal of her clothes, respondent stated to the female police officer that "she had a plane to catch" (A. 24). This would seem to indicate nothing more than a concern that the search be made quickly. Respondent had already twice consented unequivocally to the search and, after the policewoman assured her that if she did not have anything on her there would be no problem, respondent disrobed without further ado.

[53] See, *e.g.*, *United States* v. *Vasquez-Santiago*, Nos. 78-1418, 78-1419 (2d Cir. July 12, 1979), slip op. 3697, petition for cert. pending, No. 79-5197. Respondent has alleged (Br. in Opp. 14 n.7) that the record indicates the inherent coer-

411, 424-425 (1976), this Court held that a valid consent to search can be given even while a person is under arrest. The totality of the circumstances clearly indicates that respondent's consent was voluntary under *Schneckloth*, as the district court found.

B. Respondent's Consent Is Not Invalid As A "Fruit" Of An Illegal Detention.

In *Wong Sun* v. *United States*, 371 U.S. 471 (1963), it was established that evidence obtained after an illegal arrest or search may be suppressed under certain circumstances as the "fruit of the poisonous tree." The Court explained, however, that the relevant inquiry is not one of "but-for" causation, stating (*id.* at 487-488; citation omitted):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not

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civeness of the office setting in that the policewoman testified (A. 26) that none of the ten women she had searched in the preceding two years had refused consent to the search. This fact is hardly surprising, and quite irrelevant, because the policewoman was not called in until after respondent consented to be searched in response to the agent's request (A. 12), and there is no basis for supposing that she would be called to search suspects who had not consented.

In fact, the evidence indicates that the office was not a setting that would make an individual feel compelled to consent to a search. The office does not resemble an interrogation room, but is a suite containing four rooms (A. 20-21). Moreover, the limited number of reported cases originating from narcotics arrests at the Detroit airport demonstrate that individuals do refuse to consent to search in the DEA office, even where they have not been warned of their right to refuse. See *United States* v. *Van Lewis*, *supra*, 409 F. Supp. at 540.

> have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

In *Brown* v. *Illinois*, *supra*, the Court dealt with the question of the validity of a voluntary act, a confession, by a person who was being illegally detained. Three officers, acting without probable cause, broke into Brown's apartment at night, searched the apartment, and arrested Brown at gunpoint when he arrived. Brown was searched, handcuffed, and taken to the police station, where he was advised of his *Miranda* rights. Under interrogation at the stationhouse, Brown signed a statement admitting his participation in a murder. The Court concluded that Brown's confession was tainted by the illegality of his arrest and therefore not admissible in evidence, rejecting the State's contention that the *Miranda* warnnings, by themselves, assured that Brown's confession was sufficiently an act of free will so as to purge the primary taint of the unlawful arrest.

Brown does not suggest, however, that a consent to search should necessarily be considered a "fruit" of an illegal detention. First, the Court in *Brown* relied on the fact that *Miranda* warnings are not a means of either "remedying or deterring violations of Fourth Amendment rights." 422 U.S. at 601. Thus when the officers gave Brown *Miranda* warn-

ings, they protected him against violation of his Fifth Amendment rights but did not address or protect him against violations of the Fourth Amendment. Therefore it was held that the *Miranda* warnings could not automatically remove the taint of the arrest. The Court ruled that "*Wong Sun* thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment." 422 U.S. at 602.

In this case, unlike *Brown*, the consent to a search constitutes an agreement to accept an intrusion that may otherwise be barred by the Fourth Amendment. The policies of the Fourth Amendment are considered in determining the voluntariness of that consent. Thus *Brown*, characterized by the Court as a "limited" holding that decided only that *Miranda* warnings alone do not necessarily purge the taint of an illegal arrest from a confession (422 U.S. at 605), does not imply that a consented-to search must be considered a "fruit" of an illegal detention.

Second, application of the principles of attenuation set forth in *Brown*, and a comparison of the facts in this case with those in *Brown*, clearly establish the validity of the consent here. Initially, it should be noted that the violation alleged here, involving a brief detention, is considerably less intrusive than the illegal break-in, arrest, and detention at the police station involved in *Brown*. A lesser degree of attenuation should be necessary to purge the taint where the Fourth Amendment violation is less intrusive.

Not only did respondent twice consent to the search, but she did so after having been explicitly advised of her right to refuse her consent. This warning of a right to refuse, which is not required under *Schneckloth* for a finding of voluntariness, is an event that should properly be viewed as having broken "the causal connection" between any prior illegality and the eventual search. See *Dunaway* v. *New York*, *supra*, slip op. 16. Respondent was simply informed that she had a decision to make, whether to permit a search or not. This decision was independent of the preceding events (except in the but-for sense that she might not have been there to be asked, which cannot be dispositive). It is hard to imagine an action less calculated to exploit an illegal detention than prefacing a request for consent to search, as the officers did, with the advice that the consent could be refused. This advice necessarily erased any belief respondent might have had that she was expected or required to consent to a search in light of her detention. Permitting such a possible belief to persist would have been a method of exploiting the fact of detention to the agents' advantage, but they chose not to do so.

The notification of the right to refuse consent here is an intervening event of greater significance than the *Miranda* warnings in *Brown*. *Miranda* warnings are a constitutional prerequisite to interrogation that produces an admissible confession, while notification of a right to refuse consent to a search is not a constitutional prerequisite to a voluntary consent under *Schneckloth*. Moreover, the *Miranda* warnings in

Brown could not logically have been treated as an intervening event of great significance.[54] Even if his detention had been lawful, Brown would have to have been given *Miranda* warnings in order for his confession to be admissible. Thus, if the Court had held in *Brown* that the *Miranda* warnings sufficed to remove the taint of the illegal arrest, it would have eviscerated the doctrine of *Wong Sun* with respect to confessions.

Such a decision would have reduced the analysis of a confession obtained during an illegal detention to a black-and-white question. If *Miranda* warnings had been given, the confession would not be invalidated despite the illegality of the detention; if no *Miranda* warnings had been given, the confession would be invalid under *Miranda*. The *Wong Sun* doctrine would have no place in the analysis, and, therefore, the admissibility of a confession obtained following a Fourth Amendment violation would be determined without any reference at all to the policies and interests of the Fourth Amendment. In contrast, the notification of the right to refuse consent in this case, which was not constitutionally required, was indeed a significant intervening event—one that negates the

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[54] *Brown* itself, however, does seem to contemplate that, in some cases, even a *Miranda* warning could serve to attenuate the taint of an illegal detention (422 U.S. at 603) (emphasis added): "[T]he *Miranda* warnings, *alone* and *per se*, cannot *always* make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in *every* case that the Fourth Amendment violation has not been unduly exploited."

hypothesis that the consent was an exploitation of the detention. The giving of a warning that is not required is simply inconsistent with an intent to exploit.[55]

In addition to the existence of a significant intervening event breaking the causal connection, *Brown* discusses other factors to be considered in determining whether the taint has been purged. In this connection the Court gave particular emphasis to the purpose and flagrancy of the official misconduct (422 U.S. at 604). As we have argued above, we believe the agents acted lawfully in briefly questioning respondent and seeking her consent to search, as did the district court and the dissenting judge on the court of appeals. If, in fact, the agents' conduct constituted a seizure that exceeded the scope of a permissible *Terry* stop, it did so only marginally.

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[55] The Fifth Circuit has held that, in the absence of additional coercive factors, advising a suspect of his right to withhold consent to search dissipates any taint arising from the illegality of his detention. See *United States* v. *Troutman*, 590 F.2d 604 (5th Cir. 1979) (airport detention); *United States* v. *Fike*, 449 F.2d 191 (5th Cir. 1971); *Bretti* v. *Wainwright*, 439 F.2d 1042 (5th Cir.), cert. denied, 404 U.S. 943 (1971); *Phelper* v. *Decker*, 401 F.2d 232 (5th Cir. 1968). See also *United States* v. *Race*, 529 F.2d 12, 15 (1st Cir. 1976) (defendant's voluntary consent to search not an exploitation of a prior, assumedly illegal, search; defendant's consent, once obtained, provided a means of coming at the evidence that was sufficiently distinguishable to be purged of the primary taint). Cf. *United States* v. *Bazinet*, *supra*. Compare *United States* v. *Vasquez-Santiago*, *supra*, slip op. 3697, with *United States* v. *Ruiz-Estrella*, 481 F.2d 723, 728 (2d Cir. 1973).

The agents' conduct in this case cannot be characterized as flagrant. In contrast to *Brown*, where the officers broke into the defendant's apartment and arrested him at gunpoint without even a hint of probable cause, the conduct here was exemplary.[56] The decision to approach and question respondent was made by agents who believed, based on their years of experience and special training in the detecting of drug couriers, that respondent was likely to be carrying drugs. Only when initial questioning of respondent heightened the agents' suspicion did they politely request her to accompany them to a nearby office, which respondent willingly did. Inside the office they requested permission to search respondent's purse and person and advised her of her right to refuse.[57] The search occurred only after respondent

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[56] In *Dunaway* v. *New York*, *supra*, while the conduct of the police was less offensive in certain respects than that in *Brown*, the scope of the seizure of the defendant's person was similar in magnitude, and, as in *Brown*, it was clear that probable cause did not exist; indeed, the Court described the circumstances of the case as "virtually a replica of the situation in *Brown*." Slip op. 17. The flagrancy of the police conduct in *Brown* and *Dunaway* was a factor weighing against a finding of attenuation there that is absent here.

[57] The Court has characterized consent searches as "valuable" and has encouraged law enforcement officials to rely upon them (*Schneckloth*, *supra*, 412 U.S. at 227-228):

> In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. * * * In short, a search pursuant to consent may result in considerably less inconvenience for the

twice gave her consent. Respondent was not subjected to a prolonged or intense interrogation, or to any form of duress. Thus the intrusion, if any, on respondent's constitutionally protected rights was quite limited. Finally, nothing in the circumstances of this case suggests that the officers deliberately acted in excess of their lawful authority.[58]

The other factor listed in *Brown* as relevant to the attenuation inquiry is the temporal proximity of the illegality to the acquisition of the evidence. This factor has been described as "usually the least influential element of attenuation analysis." *United States* v. *Crews*, 389 A.2d 277, 297 (D.C. Ct. App. 1978), cert. granted, No. 78-777 (argued October 31, 1979). See also *Dunaway*, *supra*, (Stevens, J., concurring); 2 LaFave, *supra*, § 11.4 at 633. It can be a significant factor when the evidence is obtained some time after the illegality has ceased. See, *e.g.*, *Wong Sun*, *supra*. In this case, however, the consent was given while the alleged illegal detention was still continuing, and we do not contend that lack of temporal proximity is an attenuating factor.[59]

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subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

[58] The encounter involved in this case occurred well before the Sixth Circuit's decision in *McCaleb*. We are not aware of any appellate decisions at the time that should have suggested to the agents that their conduct might be unlawful.

[59] A fourth factor considered by the court in *Brown* was the existence of *Miranda* warnings. This factor was relevant there because the evidence in question was a confession, but

In sum, application of the principles of attenuation established in *Wong Sun* and *Brown* leads to the conclusion that respondent's consent was not tainted by any illegality in her detention. This conclusion is consistent with the policies of the exclusionary rule. An agent who observes suspicious behavior at an airport and believes that further investigation is warranted must act quickly. No purpose is served by excluding evidence discovered during a search consented to by a suspect, after being advised of his right to refuse, on those few occasions when it is later determined that the agent did not have sufficient cause to stop the suspect. Exclusion of the evidence, however, could seriously hamper the efforts of law enforcement officials to stem the dangerous and debilitating traffic in illegal drugs in this country.

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it has no application here, where the evidence was obtained by a consent search and the Fifth Amendment is not implicated. *Miranda* warnings are not a prerequisite to a valid consent to search. See, *e.g.*, *United States* v. *Lemon*, 550 F.2d 467, 472 (9th Cir. 1977); *United States* v. *Garcia*, 496 F.2d 670, 674-675 (5th Cir. 1974), cert. denied, 420 U.S. 960 (1975). The analogy to a *Miranda* warning in this context is a voluntary consent or a warning of the right to refuse consent, which, as discussed above, more strongly implies the attenuation of any Fourth Amendment taint than does a *Miranda* warning.

CONCLUSION

The judgment of the court of appeals should be reversed.

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NOVEMBER 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305530 133